

1 Braddock J. Huesman  
T#00047  
2 Assistant Attorney General  
Hon. Juan A. Sablan Memorial Bldg., 2nd Fl.  
3 Caller Box 10007, Capital Hill  
Saipan, MP 96950-8907  
4 Telephone: (670) 664-2341  
5 Fax: (670) 664-2349

6 Attorney for Defendants Department of Public Safety,  
Jarrod Manglona, Michael Langdon, and Anthony  
7 Macaranas.

8  
9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN MARIANA ISLANDS

12 AE JA ELLIOT PARK,  
13

14 Plaintiff,

15 vs.

16 JARROD MANGLONA, MICHAEL  
17 LANGDON, ANTHONY MACARANAS,  
DEPARTMENT OF PUBLIC SAFETY  
18 and JUAN DOES 1-4, NORBERT  
DUENAS BABUTA,

19 Defendants.  
20

CIVIL ACTION NO. 07-0021

**DEFENDANTS' OPOSITION TO THE  
MOTION TO STRIKE**

21 **OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE**  
22

23 Defendants Jarrod Manglona ("Defendant Manglona"), Michael Langdon ("Defendant  
24 Langdon"), Anthony Macaranas ("Defendant Macaranas")(collectively, the "DPS Defendants"),  
25 and the Department of Public Safety ("DPS") submit this Opposition to Plaintiff's Motion to  
26 Strike.  
27  
28

## ARGUMENT

From the beginning of Ms. Park's suit, qualified immunity has been a cornerstone of the DPS Defendants' arguments for dismissal. In an attempt to avoid the merits of this argument, Ms. Park has asked this court to strike portions of it instead. Such an act would be prejudicial.

DPS Defendants have filed no less than four pleadings with this court and all have dealt with DPS Defendants' right to qualified immunity. In response to the DPS Defendants' most recent dismissal motion regarding qualified immunity, Ms. Park's attorneys offered a footnote in opposition.<sup>1</sup> DPS Defendants vigorously responded to this footnote and now Ms. Park complains. The idea, however, that the DPS Defendants cannot vigorously pursue all avenues of defense available to them—especially *when Ms. Park was on notice and attempted to rebut them*—is unpersuasive.

In Ms. Park's opposition, she attempted to overcome qualified immunity by dropping a footnote and stating: "[t]he court, moreover, described the law in this area as 'clearly established,' so as to defeat a claim of qualified immunity."<sup>2</sup> Putting aside that this was all she offered in response, this argument demands a reply. Ms. Park, however, claims that: "[o]nly now, in their reply, do Defendants venture any discussion of the second step of the analysis – *i.e.*, whether the right violated was 'clearly established.'" Had Ms. Park not attacked DPS Defendants' claim to qualified immunity on the grounds that the law was clearly established, DPS Defendants would not have needed to reply. In any event, however, Ms. Park was on notice that DPS Defendants claimed qualified immunity and that part of determining qualified immunity involved a determination of whether the plaintiff's

---

<sup>1</sup> See OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT, p.6, n.4.

<sup>2</sup> *Id.*

1 rights were “clearly established.”<sup>3</sup> Ms. Park cannot argue that her rights were “clearly  
 2 established” and then complain that DPS Defendants have the temerity to address the  
 3 argument. This is common sense that finds support in federal case law.

4 Ms. Park cites *United States v. Ullah*,<sup>4</sup> for the proposition that courts will not  
 5 ordinarily consider issues raised in a reply brief that were not “specifically and distinctly  
 6 argued” in the opening brief. Putting aside that fact that the *Ullah* court is an appellate  
 7 court applying appellate rules,<sup>5</sup> Ms. Park’s attorney’s argument misses the mark in a  
 8 fundamental way. “Specifically and distinctly” means raised in the opening brief. Not, as  
 9 Ms. Park believes, “explained to her satisfaction.”

10 *Ullah* stands for the proposition that the litigant *must raise the issue in the opening*  
 11 *brief*.<sup>6</sup> When this Court examines the cases that the *Ullah* court cites, this becomes  
 12 apparent.<sup>7</sup> In other words, the courts in *Ullah* and *Fairchild Industries* did not strike an  
 13 argument because the appellant failed to analyze a claim thoroughly enough in the opening  
 14 brief of an appeal, instead, they struck arguments that were not raised *at all*. An  
 15 examination of how district courts treat this matter is more precise and instructive but leads  
 16 to the same conclusion.

17 For example in *Cohen v. Benov*<sup>8</sup> the court stated that “new claims for relief cannot  
 18 be raised in a reply brief.” Moreover, the Ninth Circuit is not alone in this holding. Several  
 19

20  
 21  
 22  
 23 <sup>3</sup> MOTION TO DISMISS SECOND AMENDED COMPLAINT, P. 17 citing *Siegert v. Gilley*, 500 U.S.  
 24 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).

25 <sup>4</sup> 976 F.2d 509 (9th Cir. 1992).

26 <sup>5</sup> *Id.*, at 514 citing Fed.R.App.P. 2.

27 <sup>6</sup> *Id.*, (“Ullah, unlike Goshō-Kim, did not raise the issue of the validity of the nonunanimous  
 28 jury verdict in his opening brief: he raised it only in his reply brief.”)

<sup>7</sup> *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)(“The Court of  
 Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly  
 argued in appellant's opening brief”).

<sup>8</sup> 374 F.Supp2d 850 (C.D. Cal., 2005).

1 courts have issued rulings that new claims cannot be raised for the first time in a reply  
 2 brief.<sup>9</sup> DPS Defendants agree with this proposition. The idea, however, that qualified  
 3 immunity is a “new claim for relief” and was brought up only in the latest reply brief is  
 4 disingenuous. Again, DPS Defendants have filed four pleadings with this Court. Each  
 5 contained an argument regarding qualified immunity. Moreover, Ms. Park’s attempt to  
 6 refute qualified immunity in her brief all but guaranteed DPS Defendants’ response.

8 As to the public duty doctrine, DPS Defendants concede that Ms. Park did not  
 9 attempt to address the issue in her opposition. DPS Defendants maintain, however, that  
 10 putting Ms. Park on notice in the opening brief made the argument fair in the reply. There  
 11 was no prejudice.

### 13 CONCLUSION

14 Ms. Park has not cited this court to any case that interprets the phrase “specifically  
 15 and distinctly” as she would have this court do. In fact, the cases she cites clearly indicate  
 16 that courts do not want brand new issues raised in a reply; not that they must be fully  
 17 briefed in the original motion. Moreover, Ms. Park’s argument against qualified immunity  
 18 was vague, misleading and forced DPS Defendants to flesh out its argument in a more  
 19 concise manner. For these reasons, Ms. Park’s motion to strike should be denied.

### 21 PRAYER

22 WHEREFORE, based upon the foregoing, this honorable Court should deny, in whole or  
 23 in part, Plaintiff’s Motion to Strike.

---

25 <sup>9</sup> See, *Fisher v. Ciba Specialty Chem. Corp.*, 238 F.R.D. 273, 316 n. 89 (S.D.Ala.2006)  
 26 (holding that new argument in reply brief was barred; by making the argument “for the first time  
 27 in their reply brief just two business days before the Hearing, plaintiffs ensured that opposing  
 28 counsel would not have a fair opportunity to study or respond to this newly raised issue, which  
 could have been presented in their principal brief”); see also, *Thurston v. Page*, 931 F.Supp. 765,  
 768 (D.Kan.1996) (holding that the court will not consider new arguments in a party's reply  
 brief).

Respectfully submitted  
Wednesday, April 09, 2008  
OFFICE OF THE ATTORNEY GENERAL

/s/  
Braddock Huesman, T#00047

CERTIFICATE OF SERVICE

I certify that a copy of Defendants' Reply to the Opposition to the Motion to Dismiss was served on George Hasselback, who is the attorney in charge for plaintiff, Ms. Park, and whose address is PO Box 501969, Saipan, MP 96950, (670) 234-5684, by electronic filing on April 9, 2008.

/s/  
**Braddock J. Huesman**